U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, N.W.
Washington, D.C. 20001-8002

Date: October 28, 1997
Case No.: 96-INA-00207

In the Matter of:

PACIFICA DEL MAR,
Employer

On Behalf Of:

GILBERT CRUZ-OCANA,
Alien

Appearance: Susan M. Jeanette, Immigration Processor
For the Employer/Alien

Before: Holmes, Huddleston, and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing

working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On April 29, 1994, Pacifica Del Mar ("Employer") filed an application for labor certification to enable Gilbert Cruz-Ocana ("Alien") to fill the position of Cook (AF 52-53). The job duties for the position are:

> Cook to prepare wide range of menu items. Use and knowledge of standard restaurant equipment, utensils and appliances. The shift is a rotating shift so that we can rotate our cooks to different schedules, to insure that they have some weekends and evenings off, depending on the shifts. There is a 30 minute meal break. Must speak Spanish/English in order to communicate effectively with the Hispanic kitchen workers (26). Able to issue OSHA safety instructions and food preparation instructions under pressure.

The requirements for the position are a high school diploma and two years of experience in the job offered or two years of experience in a restaurant. In addition, the Employer stated that applicants must have a foodhandler's card as required by the Department of Health, County of San Diego.

The CO issued a Notice of Findings on June 30, 1995 (AF 45-50), proposing to deny certification on three grounds. First, the CO found that the Employer's foreign language requirement is unduly restrictive. Likewise, the CO found that the requirement that all applicant's possess a foodhandler's card is unduly restrictive. Finally, the CO found that there are U.S. workers who are able and available to fill the job opportunity.

Accordingly, the Employer was notified that it had until August 4, 1995, to rebut the findings or to cure the defects noted.

The Employer's rebuttal includes a statement from the individual who teaches the foodhandler's class, as well as the ordinance stating that restaurant workers are required to possess a foodhandler's card (AF 15-20). The remainder of the Employer's rebuttal is written in Spanish (AF 21-44).

The CO issued the Final Determination on October 11, 1995 (AF 12-14), denying certification because the Employer failed to rebut § 656.21(b)(2), that the job opportunity contains a foreign language requirement which has not been supported by evidence of business

---

[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

necessity. In addition, the CO found that the Employer's requirement that applicants possess a foodhandler's card is unduly restrictive. Finally, the CO continued to find that there are U.S. applicants who are qualified for the job opportunity.

On October 31, 1995, the Employer requested review of the denial of labor certification (AF 2-11). The CO denied reconsideration on November 3, 1995, and forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board").

Discussion

Section 656.21(b)(2) proscribes the use of unduly restrictive job requirements in the recruitment process. The reason unduly restrictive requirements are prohibited is that they have a chilling effect on the number of U.S. workers who may apply for or qualify for the job opportunity. The purpose of § 656.21(b)(2) is to make the job opportunity available to qualified U.S. workers. *Venture International Associates, Ltd.*, 87-INA-569 (Jan. 13, 1989) (*en banc)*. Where an employer cannot document that a job requirement is normal for the occupation or that it is included in the *Dictionary of Occupational Titles* (DOT), or where the requirement is for a language other than English, involves a combination of duties, or is that the worker live on the premises, the regulation at § 656.21(b)(2) requires that the employer establish the business necessity for the requirement.

To establish business necessity for a foreign language, the two-prong standard of *Information Industries*, 88-INA-82 (Feb. 9, 1989) (*en banc)* is applicable. See also, *Coker's Pedigreed Seed Co.*, 88-INA-48 (Apr. 19, 1989) (*en banc)*. The first prong generally involves whether the employer's business includes clients, co-workers, or contractors who speak a foreign language, and what percentage of the business involves the foreign language. The second prong focuses on whether the employee's job duties require communicating or reading in a foreign language.

The issue in this case is whether the Employer has met its burden of establishing the business necessity of its foreign language requirement. In rebuttal, the Employer has only submitted what appears to be its employee manual, which is written in Spanish, without any further explanation (AF 21-44). Although this evidence indicates that the Employer has Spanish-speaking employees, it is not sufficient to meet the Employer's burden of proof. The Employer has not stated how many of its workers communicate, by necessity, in Spanish or what percentage of its business involves Spanish. In addition, the Employer has not established that the employee's job duties require communicating in Spanish. Therefore, we find that the Employer's employee manual alone is insufficient to satisfy the standard set forth in *Information Industries,*

supra.[2] Accordingly, we find that the Employer has not established the business necessity of its foreign language requirement and the CO's denial of labor certification is hereby AFFIRMED.[3]

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.

[2] In its Appeal Brief, the Employer stated that a list of its Hispanic workers was submitted with its "Response to the Notice of Findings." However, no such list or Employer explanation has been included in the record. The Employer further argued that similar cases have been previously approved. However, we emphasize that previous cases decided by the CO have no precedential value and, therefore, are not relevant in this case. See *Tedmar's Oak Factory*, 89-INA-62 (Feb. 26, 1990). Finally, we agree that it is important for employees to be able to communicate safety regulations. However, the Employer in this case has not established the business necessity of its foreign language requirement.

[3] Because we have affirmed the CO's denial on this basis, we find it unnecessary to discuss the remaining issues discussed in the Final Determination.